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Supreme Court, U.S.
FILED
AUG 22 1996
CLERK

No. 96-129

In The

Supreme Court of the United States

October Term, 1995

EDWARD BRODNICKI,

Petitioner,

vs.

CITY OF OMAHA, NEBRASKA, A Municipal Corporation, COUNTY OF DOUGLAS, a Nebraska Political Subdivision, PATRICK A. McCASLIN, KEVIN DONLAN, JEFFERY J. THEULEN, JOHN SKANES, JOHN SWANSON, MICHAEL HOCH, and JAMES JANSEN,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Nebraska

RESPONDENTS' BRIEF IN OPPOSITION

HERBERT M. FITLE
City Attorney
THOMAS O. MUMGAARD
Assistant City Attorney
SHERI E. LONG pka SHERI E. COTTON
Assistant City Attorney
Counsel of Record
804 Omaha/Douglas Civic Center
1819 Farnam Street
Omaha, Nebraska 68183
(402) 444-5115

Counsel of Record for Respondent, City of Omaha

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

6 pp

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondents City of Omaha, Patrick A. McCaslin, Kevin Donlan, Jeffery J. Theulen, John Skanes, John Swanson and Michael Hoch request that this Court deny the petition for writ of certiorari seeking review of an opinion of the Eighth Circuit Court of Appeals reprinted in the petition for certiorari at Appendix 1 through 15.

STATUTE INVOLVED

28 U.S.C. §1254 (1)

RULES INVOLVED

Rule 10(a) of the Rules of the Supreme Court of the United States

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below

The Petitioner filed a civil rights action under 42 U.S.C. §1983 on March 17, 1992, alleging that he was arrested by the Respondent Omaha police officers without probable cause. By order entered January 25, 1995, United States District Court Judge Lyle Strom granted summary judgment to the individual Omaha police officers. Although the motion before the court at that time

contended that the officers were protected by qualified immunity, the court decided the motion by finding that probable cause existed. The immunity issue was left unresolved. On February 24, 1995, Judge Strom entered summary judgment on behalf of the City of Omaha. Again, Judge Strom found that probable cause supported plaintiff's arrest. On January 31, 1996, the Eighth Circuit Court of Appeals entered an order affirming the District Court's order granting summary judgment.

B. Correction of Misstatements in the Petition.

The opinion of the Court of Appeals correctly sets forth the facts of this case and the Respondents respectfully direct the Court's attention to the appellate court's opinion reprinted in the petition for certiorari at Appendix 1 through 15.

Pursuant to United States Court Rule 15.2 Respondents direct the Court's attention to the following misstatements of facts in the Petition:

On page 8 of the Petition, the Petitioner states that the only fact given by the alleged victim to the officers that was consistent with the alleged victim's statement was the license number of the Petitioner's car. Further, Petitioner consistently refers to the "show-up" as unduly suggestive, thus inferring that the appellate court determined the show-up was inappropriate, but not actionable. However, the Court of Appeals observed in its opinion:

> " . . . She [the alleged victim] gave the police a specific description of the car, its license plate

> number, and a detailed account of the incident. . . . Callaghan's [the alleged victim's] mother made statements to the officers attesting to her daughter's truthfulness. Callaghan identified Brodnicki in a show-up. Upon this evidence, a reasonable police officer could conclude that probable cause existed to arrest Brodnicki." (Petition Appendix, p. App. 6)

REASONS FOR DENYING WRIT

Rule 10(a) of Rules of the Supreme Court of the United States suggests that the Court decline to exercise discretion to grant a petition for a writ of certiorari unless, among other things,

> "(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important issue . . . ; or, has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
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> * * *
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> (c) . . . a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court"

As the result of Petitioner's repeated mischaracterization of the "show-up" identification procedure in the instant case as "unduly suggestive" and his inference that

the "show-up" procedure was the sole factor upon which the lower courts found probable cause, the Petitioner has identified a question, to wit: "When does an identification procedure violate due process under the Fourth, Fifth and Fourteenth Amendments?" that was not a deciding factor in the lower courts' resolution of the issues in the instant case. The issue decided by those courts was whether the Respondents had probable cause to arrest Brodnicki. (District Court Memorandum Opinion and Order, Petition Appendix, p. App. 24, Eighth Circuit Opinion, Petition Appendix, p. App. 3). The identification procedure initiated in the form of a "show-up" and specifically determined by both lower courts to be appropriate, was only one minor factor in the lower courts' determination of the existence of probable cause. Once the Court found that the individual officers did not violate the Petitioner's constitutional rights, the lower courts determined that the Petitioner could not press a claim against the City of Omaha under the theory of inadequate training or municipal custom citing *Los Angeles v. Heller*, 475 U.S. 796, 799 (1986), *Reynolds v. Little Rock*, 893 F.2d 1004, 1007 (8th Cir. 1990), *cert. denied*, 501 U.S. 1204 (1991) and *Abbot v. Crocker*, 30 F.3d 994, 998 (8th Cir. 1994). (Petition Appendix, pp. 9 and 17)

The Petitioner has not identified any action by the lower courts that would, in this case, justify granting a writ of certiorari.

CONCLUSION

The Petition for certiorari should be denied.

Respectfully submitted,

HERBERT M. FITLE
City Attorney
THOMAS O. MUMGAARD
Assistant City Attorney
SHERI E. LONG PKA SHERI E. COTTON
Assistant City Attorney
Counsel of Record
804 Omaha/Douglas Civic Center
1819 Farnam Street
Omaha, Nebraska 68183
(402) 444-5115

Attorneys for Respondents